NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 0940

STATE OF LOUISIANA

VERSUS

DARRYL WINFREY

DATE OF JUDGMENT: FEB 1 5 2013

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 03-07-1095, SECTION 8, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TRUDY M. WHITE, JUDGE

* * * * * *

Hillar C. Moore, III, DA
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Ronald Gathe, ADA
Sonia Washington, ADA
Stacy L. Wright, ADA
Baton Rouge, Louisiana

Kevin V. Boshea
Metairie, Louisiana

Counsel for Defendant-Appellant
Darryl Winfrey

* * * * * *

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

KUHN, J.

The defendant, Darryl Winfrey, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict and was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals, contending: (1) the verdict is contrary to the law and the evidence; (2) the trial court erred in denying the motion for new trial;[1] and (3) the trial court erred in denying the motion to suppress his oral statement. For the following reasons, we affirm the conviction and sentence.

FACTS

On January 25, 2007, the Baton Rouge Police Department investigated a homicide at 1900 Blount Road, Scotland Square Apartments, Apartment #222, where the victim, Traneka Tezano, was lying dead in the kitchen. She had suffered forty-three stab wounds, including a fatal wound to her heart. Most of the other wounds had been inflicted after the fatal wound. The victim was also shot in the head, but the bullet did not penetrate all the way through the victim's skull.

There was no sign of forced entry, nor was there any indication that the apartment had been ransacked. In one bedroom, two knives were found on the bed. In another bedroom, a pistol handle was found behind the bedroom door. A kitchen fork was located behind the front door, and a meat cleaver without a handle was on the living room floor. Additionally, a butter knife was laying on the kitchen floor by the victim's feet.

---

[1] The defendant failed to present any argument in support of assignment of error number two. Assignments of error not briefed on appeal are considered abandoned. Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4.

The victim's diary and a day planner calendar were on her dresser. A January 24, 2007 entry in the day planner stated, "No more Poppa! Darryl [b]ack in the picture!" The victim also indicated she thought she was pregnant by "Poppa." Subsequent investigation revealed the victim referred to Johnny Read as "Poppa."

Stacey Veal lived across from the victim's apartment at the time of the offense. When Veal walked out of her apartment at approximately 7:00 a.m. on January 25, 2007, she saw a tall, skinny, black man come out of the victim's apartment "running real fast." Veal testified that, "[h]e ran out like he was scared." The man watched Veal as she proceeded to her truck. She saw no one else exit the victim's apartment.

Tiffany Ware also lived at Scotland Square Apartments at the time of the offense. After the police arrived to investigate the homicide, she "thought about the night before that [the defendant] had called [Ware's] house for [the victim]." Ware called the defendant and asked when he had left the victim's apartment. The defendant replied, "Oh, it was about the time the children go to school." Ware told the defendant the victim had just been found dead in her apartment, and he stated, "Why it sounds like you're laughing and playing?" Ware notified a police officer at the scene about her conversation with the defendant, but when they attempted to call him back, "the lady said that she had just dropped him off."

Miranda Deemer lived above the victim's apartment at the time of the offense. On January 25, 2007, at approximately 7:00 a.m., she heard arguing, dishes breaking, and approximately three gunshots. After the gunshots, she heard a scream and someone say "Oh Fuck." Thereafter, she looked out the window and saw a car leaving the apartment complex.

On January 25, 2007, at approximately 3:00 p.m., the defendant went to a hospital emergency room, claiming he had been assaulted. He had three lacerations on the palm of his left hand, which the physician who treated him opined were "fairly new."

On February 1, 2007, the defendant gave a recorded oral statement to the police in which he claimed he had "watched" the victim's murder. He indicated he had earlier introduced the victim to "Black," a drug dealer from the Magnolia Housing Project in New Orleans. The defendant claimed the victim had robbed Black, who had "[come] looking for all of us." According to the defendant, in the early morning "between dark and light," Black arrived at the victim's apartment with his "posse." The defendant initially claimed that he "walked up and they were there." Later, he stated that he was on the bed with the victim when Black and two of his accomplices entered the bedroom. The defendant claimed he heard a shot and thought Black might have killed the victim. The defendant also claimed he heard additional shots. He indicated the victim started calling his name, but he could not help her because he was being held by Black's accomplices.

The defendant claimed one of Black's accomplices cut the defendant's hand, while asking him, "Where the shit at?" The defendant indicated Black told him, "You get my shit. You don't get my shit, I'm gonna kill this bitch." The defendant stated Black repeatedly "slung" the victim against the wall. The defendant indicated that Black and his accomplices had one gun, which they passed between them. The defendant also claimed Black and his accomplices dropped the weapon during the incident, and the defendant tripped over or grabbed the weapon. The defendant indicated Black "poked" the victim with a knife, telling her "I want my shit." The defendant further indicated the assailants

ransacked the victim's apartment. According to the defendant, when they finally let go of him, he quickly exited the apartment.

In response to questioning, the defendant claimed that he failed to call anyone to check on the victim because he did not have anyone's telephone number and failed to call 911 because he did not have a phone. When asked why he had not reported the attack to security personnel at the hospital emergency room, the defendant responded, "I wanted to … seeing all that shit fucked with me." When asked if his DNA would be found on any items at the crime scene, he stated he had grabbed a butter knife, and may have grabbed a fork.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number one, the defendant argues the jury did not act rationally in convicting him because there was no direct evidence of his participation in the murder of the victim.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier-of-fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also La. C.Cr.P. art. 821. In conducting this review, a court also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. ***State v. Wright***, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 00-0895 (La. 11/17/00), 773 So.2d 732 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. ***Wright***, 730 So.2d at 487. Moreover, once the crime itself has been established, a confession alone may be used to identify the accused as the perpetrator. ***State v. Carter***, 521 So.2d 553, 555 (La. App. 1st Cir. 1988).

As applicable here, second degree murder is the killing of a human being "[w]hen the offender has a specific intent to kill or to inflict great bodily harm." La. R.S. 14:30.1(A)(1). Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Though intent is a question of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. Specific intent is an ultimate legal conclusion to be resolved by the factfinder. ***State v. Henderson***, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 751, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

In ***State v. Mitchell***, 99-3342 (La. 10/17/00), 772 So.2d 78, the Louisiana Supreme Court set forth the following precepts for appellate review of circumstantial evidence in connection with review of the sufficiency of the evidence:

> On appeal, the reviewing court "does not determine whether

> another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events." Rather, the court must evaluate the evidence in a light most favorable to the state and determine whether the possible alternative hypothesis is sufficiently **reasonable** that a rational juror could not have found proof of guilt beyond a reasonable doubt.
>
> The jury is the ultimate factfinder of "whether a defendant proved his condition and whether the state negated that defense." The reviewing court "must not impinge on the jury's factfinding prerogative in a criminal case except to the extent necessary to guarantee constitutional due process." ...
>
> "The actual trier of fact's *rational* credibility calls, evidence weighing, and inference drawing are preserved ... by the admonition that the sufficiency inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt." The reviewing court is not called upon to determine whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Rather, the court must assure that the jurors did not speculate where the evidence is such that reasonable jurors must have a reasonable doubt. The reviewing court cannot substitute its idea of what the verdict should be for that of the jury. Finally, the "appellate court is constitutionally precluded from acting as a 'thirteenth juror' in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact."

Mitchell, 772 So.2d at 83 (citations omitted).

After a thorough review of the record, we are convinced that any rational trier-of-fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the essential elements of second degree murder and the defendant's identity as the perpetrator of that offense against the victim. The defendant admitted that he was present in the victim's apartment at the time of her murder. The verdict returned in this case indicates the jury rejected the defendant's theory that "Black" and his "posse" killed the victim. The jury obviously concluded that the defendant's account of the murder was a fabrication designed to deflect blame from himself. When a case involves circumstantial evidence and the jury reasonably rejects the

hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. ***State v. Moten***, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). No such hypothesis exists in the instant case. Further, in reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See ***State v. Ordodi***, 06-0207 (La. 11/29/06), 946 So.2d 654, 662. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. ***State v. Calloway***, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

MOTION TO SUPPRESS

In assignment of error number two, the defendant argues the trial court erred in denying the motion to suppress his statement on the basis of a violation of his right to counsel under ***Michigan v. Jackson***, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), overruled, ***Montejo v. Louisiana***, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009).

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See ***State v. Green***, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See ***State v. Hunt***, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.

In ***Miranda v. Arizona***, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966), the Supreme Court found that if a suspect indicates "in any

manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." ***Edwards v. Arizona***, 451 U.S. 477, 481-85, 101 S.Ct. 1880, 1883-85, 68 L.Ed.2d 378 (1981), reconfirmed these views and, to lend them substance, held that when an accused either before or during interrogation asks for counsel, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated, custodial interrogation, even if he has been advised of his rights. The accused is not subject to further interrogation by the authorities until counsel is present, unless the accused himself initiates further communication, exchanges, or conversations with the police. ***Edwards***, 451 U.S. at 484-85, 101 S.Ct. at 1885; see ***Maryland v. Shatzer***, 559 U.S. 98, 130 S.Ct. 1213, 1219, 175 L.Ed.2d 1045 (2010).

When a defendant invokes his ***Miranda*** right to counsel, the admissibility of his subsequent confessions under federal law is to be determined by a two-step analysis: it first must be asked whether the defendant "initiated" further conversation; and if the answer is yes it must be inquired whether the defendant waived his right to counsel and to silence, that is, whether the purported waiver was knowing and intelligent under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities. ***State v. Abadie***, 612 So.2d 1, 5 (La. 1993), cert. denied, 510 U.S. 816, 114 S.Ct. 66, 126 L.Ed.2d 35 (1993). See also La. R.S. 15:452 ("[No arrestee] shall be subjected to any treatment designed by effect on body or mind to compel a confession of crime.")

The Sixth Amendment right to counsel does not attach prior to the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. ***State v. Carter***, 94-2859 (La. 11/27/95), 664 So.2d 367, 372. Further, the right to counsel exists only

during those post-attachment, pretrial confrontations which can be considered "critical stages." A critical stage has been described as a critical pretrial confrontation where the results might well settle the accused's fate and reduce the trial to a mere formality. It has also been described as a pretrial proceeding where the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both. ***Carter***, 664 So.2d at 373. The right to counsel under Louisiana Constitution, Article I, § 13 and the right to counsel under the Sixth Amendment are coextensive in scope, operation, and application. ***Carter***, 664 So.2d at 382.

Prior to trial, the defendant moved to suppress his statement, arguing that the statement was involuntary because he had not been adequately informed of his rights prior to giving the statement and had not been allowed to contact his attorney prior to giving the statement. Following a hearing, the motion was denied. The trial court found the totality of the circumstances indicated the defendant freely, knowingly, and voluntarily waived his right to counsel prior to giving the statement.

Baton Rouge Police Department Detective Ross Williams testified at the hearing. Following the homicide of the victim, he tried to contact the defendant. Thereafter, a "couple of days" prior to February 1, 2007, the defendant contacted Detective Williams from California, and told him he was coming back to Baton Rouge. On February 1, 2007, the defendant came to the police station with Counsel Lennie Perez

Detective Williams advised the defendant of his ***Miranda*** rights, and he and Perez agreed to waive those rights. Pursuant to a search warrant for the defendant's DNA, a crime scene technician took an oral swab of DNA from the

defendant and photographed his hands. Thereafter, the defendant left with Perez without making a statement.

Approximately twenty to thirty minutes later, the defendant returned without counsel. The subsequent audio recording reveals that, before the defendant gave his statement, Detective Williams asked him, "You want Mr. Perez here or you just want to talk to me? ... You don't want Mr. Perez back in here?" The defendant responded, "Nah bro. ... The only reason why I really brought him was because I ain't know how y'all were going to handle the situation when I got down here." The defendant then gave a recorded statement to the police concerning the victim's death.

Detective Williams testified he made no threats or promises to the defendant to coerce his statement. He indicated the defendant did not appear to be under the influence of drugs or alcohol. He stated that when the defendant first appeared with counsel, probable cause did not exist to place him under arrest, and he was not under arrest at that time. Additionally, Detective Williams stated the defendant was not under arrest either before or while giving his statement.

In ***Michigan v. Jackson***, 475 U.S. at 636, 106 S.Ct. at 1411, the Supreme Court held that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." However, as previously noted, ***Michigan v. Jackson*** has been overruled. Moreover, even under that case, the defendant's decision to speak to the police without counsel was not prohibited. The police in this case did not initiate interrogation of the defendant. Moreover, even if appearing with counsel prior to the statement was an assertion of the right to counsel, that assertion was made prior to the initiation of adversary judicial criminal proceedings.

We find no error or abuse of discretion in the trial court's denial of the motion to suppress the defendant's oral statement. The defendant reinitiated the conversation with Detective Williams. The totality of the circumstances indicate the defendant knowingly and intelligently waived his right to counsel and to silence after he was advised of his rights.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."

The trial court did not wait twenty-four hours after denying the defendant's motion for new trial before imposing sentence. See La. C.Cr.P. art. 873. However, defendant neither contests his sentence, complains about the absence of the 24–hour delay, nor cites any prejudice resulting from the trial court's failure to delay sentencing. Additionally, Louisiana jurisprudence has recognized that the trial court's failure to observe the 24–hour delay is harmless in situations where the sentence is mandatory in nature. See ***State v. Bishop***, 10-1840 (La. App. 1st Cir. 6/10/11), 68 So.3d 1197, 1208, writ denied, 11-1530 (La. 12/16/11), 76 So.3d 1203. Thus, since the life sentence imposed in the instant case was mandatory under La. R.S. 14:30.1(B), the trial court's failure to observe the statutory 24–hour delay was harmless error. ***Bishop***, 68 So.3d at 1208.

CONVICTION AND SENTENCE AFFIRMED.